Nik Asmawi bin Nik Daud v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–27 OF 2005
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
30 NOVEMBER 2009

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Criminal Law — Dangerous Drugs Act 1952 — s 39B — Trafficking in 29,345.5g cannabis — Appeal against conviction and sentence — Prosecution's failure to call or offer witnesses — Whether drawing of adverse inference warranted — Failure to clarify ownership of vehicle used to transport drugs — Failure to show exclusivity of possession of drugs — Whether ample ground for appellate interference

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The appellant was charged at the High Court under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the same for trafficking in 29,345.5g of cannabis. At the close of the prosecution's case, the judge amended the charge to one of possession under s 6 of the Act punishable under s 39A(2) of the same Act, and ordered the appellant to enter his defence on the amended charge. He pleaded guilty, was convicted thereon and was sentenced to 15 years' imprisonment and ten strokes of the cane. On appeal to the Court of Appeal by the prosecution, the court ('the first panel') reversed the decision of the judge and directed the appellant to enter his defence on the original charge of trafficking in the High Court. At the end of the full trial, the judge held that the appellant had failed to raise any reasonable doubt on the prosecution's case. The appellant was thus convicted under the original charge of trafficking and sentenced to death. The appellant appealed.

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Held, allowing the appeal:

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(1) In his cautioned statement, ie P20, the appellant admitted that one Lazim had asked him to send the cannabis to his friends, Najib and Taib. Yet at the close of the prosecution's case these three persons were never investigated, called or offered. This failure to do any of the mentioned acts by the prosecution was a serious omission which warranted the invocation of adverse inference provision. Any lingering doubt of whether the appellant actually knew the contents of the gunnysacks could have been dispelled, had the named persons in the cautioned statement been investigated. Without knowledge there could be no possession. In the circumstances of the case, an inference drawn in the appellant's favour was warranted (see paras 9, 17 & 20). *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54 followed.

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(2) The prosecution never attempted to clarify the ownership of the car the appellant was driving in which was arrested. For the prosecution to

succeed in obtaining a conviction it must establish not only that the appellant had knowledge of the existence of the drugs but that he had exclusive custody and control of them. In the instant case, the appellant's role would be the innocent and momentary courier. Without any duty imposed on the appellant to absolve himself of the ownership of the drugs at the prosecution's stage let alone there being no exclusivity of possession of the drugs, strengthened by a credible defence of innocent carrier, the position of the prosecution was thus untenable (see paras 21–22).

(3) It was rather unsafe for this panel to uphold the conviction of trafficking, in light of the nonchalance of the prosecution that attracted the adverse inference, the failure to establish exclusive possession, and the High Court's subsequent unexplained radical shifting of stance, be it for the establishment of the ingredients of possession or trafficking. The shifting of stance for the establishment of the ingredient of trafficking clearly militated against the prosecution's case, which also effectively derailed the defence of the appellant. Due to the seriousness of the error there was thus ample ground for appellate interference (see para 33). *Chow Kok Keong v Public Prosecutor* [1998] 2 CLJ 469 referred.

[Bahasa Malaysia summary

Perayu telah didakwa di Mahkamah Tinggi di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') yang boleh dihukum di bawah s 39B(2) untuk tuduhan mengedar 29,345.5g kanabis. Pada penutup kes pendakwaan, hakim telah meminda tuduhan tersebut kepada milikan di bawah s 6 Akta tersebut yang boleh dihukum di bawah s 39A(2) Akta yang sama dan mengarahkan perayu untuk membela diri terhadap tuduhan yang dipinda tersebut. Dia mengaku salah dan telah disabitkan dan dihukum 15 tahun penjara dan sepuluh kali sebatan rotan. Semasa rayuan ke Mahkamah Rayuan oleh pendakwaan, mahkamah ('panel pertama') telah mengakas keputusan hakim dan memerintah perayu untuk membela diri terhadap pertuduhan asal iaitu pengedaran, di Mahkamah Tinggi. Pada akhir perbicaraan penuh, hakim memutuskan bahawa perayu telah gagal untuk membangkitkan sebarang kebarangkalian munasabah terhadap kes pendakwaan. Perayu oleh itu telah disabit di bawah pertuduhan asal pengedaran dan dihukum mati. Perayu telah merayu.

Diputuskan, membenarkan rayuan:

(1) Di dalam pernyataan beramarannya, iaitu P20, perayu mengaku bahawa seorang yang bernama Lazim telah memintanya menghantar kanabis tersebut kepada rakan-rakannya, Najib dan Taib. Namun begitu, pada penutup kes pendakwaan, ketiga-tiga orang tersebut tidak pernah disiasat, dipanggil atau ditawarkan. Kegagalan untuk melakukan mana-mana tindakan yang disebut oleh pendakwaan merupakan peninggalan yang serius yang mana mewajarkan penggunaan

peruntukan inferens bertentangan. Sebarang keraguan yang masih ada tentang sama ada perayu sebenarnya mengetahui kandungan karung guni mungkin dapat dilenyapkan, sekiranya mereka yang dinamakan di dalam pernyataan beramaran tersebut telah disiasat. Tanpa sebarang pengetahuan, tidak terdapat pemilikan. Dalam keadaan kes ini, inferens yang dibuat bagi pihak perayu harus diwajarkan (lihat perenggan 9, 17 & 20); *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54 diikut.

(2) Pihak pendakwaan tidak pernah cuba untuk menjelaskan milikan kereta yang dipandu oleh perayu yang telah ditahan. Bagi pendakwaan untuk berjaya dalam memperoleh sabitan, ia bukan hanya perlu dibuktikan bahawa perayu mempunyai pengetahuan tentang kewujudan dadah-dadah tersebut tetapi juga bahawa dia mempunyai jagaan dan kawalan penuh terhadapnya. Dalam kes ini, peranan perayu adalah sebagai pembawa yang tidak bersalah dan buat kali itu sahaja. Tanpa sebarang kewajipan yang dipertanggungjawabkan ke atas perayu untuk melepaskan dirinya daripada pemilikan dadah-dadah tersebut pada peringkat pendakwaan tambahan pula tidak terdapat milikan secara eksklusif dadah tersebut, disokong oleh pembelaan pembawa tidak bersalah yang boleh dipercayai, maka kedudukan pendakwaan tidak dapat dipertahankan (lihat perenggan 21–22).

(3) Adalah berbahaya bagi panel ini untuk mengesahkan sabitan pengedaran, berdasarkan kepada sikap acuh tidak acuh pendakwaan yang membawa kepada inferens bertentangan, kegagalan untuk membuktikan milikan secara eksklusif, dan perubahan pendirian radikal Mahkamah Tinggi yang tidak dapat dijelaskan, tidak kira untuk pembuktian faktor milikan atau pengedaran. Perubahan pendirian untuk pembuktian faktor pengedaran jelas bercanggah dengan kes pendakwaan, yang mana menyimpang daripada pembelaan perayu. Disebabkan keseriusan kesilapan tersebut, dengan itu terdapat alasan yang mencukupi untuk campur tangan Mahkamah Rayuan (lihat perenggan 33); *Chow Kok Keong v Public Prosecutor* [1998] 2 CLJ 469 dirujuk.]

Notes

For cases on s 39B of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 263–307.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Pean Leon v PP [1956] MLJ 237, HC (refd)
Chow Kok Keong v PP [1998] 2 MLJ 337; [1998] 2 CLJ 469, FC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Lim Hock Boon v PP [2007] 1 MLJ 46; [2007] 4 CLJ 114, CA (refd)
Mat v PP [1963] MLJ 263, HC (refd)

A *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64; [1980–1981] SLR 48, PC (refd)
B *PP v Kau Joo Huat* [1988] 2 MLJ 91, SC (refd)
PP v Lim Ah Bek [1989] 2 CLJ 1090, HC (refd)
Soorya Kumar a/l Narayanan @ Narayanasamy v Pendakwa Raya [2009] MLJU 419; [2009] 6 CLJ 257, CA (refd)
Toh Ah Loh and Mak Thim v Rex [1949] MLJ 54 (folld)
C *Wong Swee Chin v PP* [1981] 1 MLJ 212, FC (refd)
Yee Wen Chin v PP [2008] 6 MLJ 222, CA (refd)

Legislation referred to

Criminal Procedure Code s 182A(i)
D Dangerous Drugs Act 1952 ss 2, 6, 37(d), (da), 39A, A(2), 39B(1)(a), (2)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 47–2 of 1997 (High Court, Muar)

Gurbachan Singh s/o Bagawan Singh (Bachan & Kartar) for the appellant.
E *Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Suriyadi JCA (delivering judgment of the court):

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[1] The appellant was charged at the High Court under s 39B(1)(a) punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'), for trafficking 29,345.5g of cannabis on 23 June 1996. At the end of the prosecution's case, the learned judge amended the charge to one of possession
G under s 6 of the Act punishable under s 39A(2) of the same Act, and ordered the appellant to enter his defence on the said amended charge. He pleaded guilty to it and sentenced to 15 years of imprisonment and ten strokes of whipping. That took place on 11 March 1998.

H **[2]** On appeal to the Court of Appeal by the prosecution, the court (first panel) on 29 November 2004, reversed the decision of the learned judge and directed the appellant to enter his defence on the original charge of trafficking ('the original charge of trafficking'). He elected to give sworn evidence but did not call any other witness. At the end of the full trial, the learned judge held that
I the appellant had failed to raise any reasonable doubt on the prosecution's case, and thereupon was convicted under the original charge of trafficking, and sentenced to death. The appellant then filed this appeal hence the matter before us. For easy reference we will refer to the respondent as the prosecution through out.

[3] The original charge of trafficking reads as follows:

> Bahawa kamu pada 23hb Jun 1996 jam lebih kurang 5.15 petang di hadapan kedai makan di Simpang Tiga Lebuhraya Segamat/Kuantan, Segamat, dalam daerah Segamat dalam Negeri Johor, telah didapati mengedar dadah berbahaya, iaitu 29,345.5 gram cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[4] Regretfully we did not have the benefit of any ground of judgment from the first panel and thus the learned judge and this panel suffered the same handicap. We were unable to conclusively state whether the first panel had found that there was an affirmative finding of possession combined with actual trafficking, possession based on presumption followed by actual trafficking say under s 2 of the Act, or an affirmative possession followed by presumed trafficking under s 37(da) of the Act (*Soorya Kumar a/l Narayanan @ Narayanasamy v Pendakwa Raya* [2009] MLJU 419; [2009] 6 CLJ 257; *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980–1981] SLR 48). We could only infer that the order of the first panel must have been on the third suggestion ie an affirmative finding of possession coupled with the presumed trafficking under s 37(da) of the Act. This view was arrived at as there was no other basis for such an order except for what was canvassed by the prosecution at p 143 of the rekod rayuan, which reads:

> Saya ada penghujahan bertulis. Membacakan penghujahan … Tertuduh tahu barang yang dibawa ialah dadah ganja. Anggapan seksyen 37(da)(vi).

[5] The thinking of the learned judge was well documented in two grounds of judgment prepared by him, respectively for the amended charge (ie first judgment) and conviction of the original charge of trafficking (second judgment).

[6] The prosecution's evidence, upon which the Court of Appeal had concluded that a prima facie case of trafficking had been established and thereupon ordered the defence to be called is as follows. Acting on information, at about 2pm on 23 June 1996, a group of eight police officers, headed by ASP Nordin bin Idris ('SP5') from Jabatan Narkotik Johor Bahru went to Segamat to lay an ambush. There SP5 divided the group into two teams, the first headed by SP5, and the second team headed by D/Sjn Badron bin Ismail. The first team stationed itself at the Petronas petrol station near the T-junction of Segamat/Kuantan whilst the second team waited at KM14, Lebuhraya Segamat/Kuantan.

[7] At about 5.10pm, the suspect's car bearing registration No WBK 6708 passed by the second team and it relayed the information to SP5. When the car

reached the T-junction where the first group was stationed, the first group trailed the car. On seeing the car stopping at the nearby restaurant, SP5 went towards it. He saw the appellant opening the car door. There was no other person in it. SP5 approached the appellant and introduced himself. As the appellant attempted to run away, SP5 had to chase after him for about five meters before arresting him. SP5 opened the boot of the car using the ignition key. From the car boot, SP5 seized two gunnysacks, with each containing 15 slabs of dried leaves believed to be cannabis.

[8] The prosecution then successfully tendered his cautioned statement ie P20. The relevant part of the cautioned statement reads as follows:

S: Adakah sesiapa memujuk, memaksa atau berjanji dengan kamu supaya memberi percakapan kepada saya?

A: Tiada.

S: Adakah apa-apa yang hendak kamu katakan kepada saya?

A: Ada. *Ganja yang dirampas itu bukan saya punya, ianya kepunyaan Lazim. Lazim yang menyuruh saya hantar ke Segamat. Lazim suruh saya serahkan kepada Najib dan Taib di Segamat*. Ini sahaja yang hendak saya katakan.

[9] From the above excerpt the appellant had admitted that Lazim had asked him to send the cannabis to his friends Najib and Taib.

[10] At the close of the defence case, it was thus incumbent upon the learned judge to undertake a maximum evaluation exercise of the evidence adduced at the prosecution and defence stage, and thereafter decide whether the prosecution had successfully established a case beyond reasonable doubt. This he did and eventually concluded that the prosecution indeed had proven its case beyond reasonable doubt. He supplied reasons for the conviction of the appellant of the trafficking charge, and as said above, in his *second judgment*.

[11] Let us pore over the evidence of the defence again. In his defence, he gave evidence that he lived in Jerteh in the state of Terengganu. He had planned to go to Johor together with his friend Lazim who was a batik trader, to attend the wedding of his adopted brother at Kulai, to be held on 24 June 1996. On 23 June 1996 Lazim came to his house driving a car bearing registration No WBK 6708. The latter told him that he could not go to Johor and instead asked the appellant to drive alone with his elder brother's car ie one Sulaiman. Lazim also asked the appellant to help him send some *kain batik* to his friends Najib and Taib, at a restaurant known as Sinar Suria in Segamat. He testified that Lazim told him that the *kain batik* was in the car boot in gunnysacks. The appellant saw the gunnysacks but did not open them in order to check the contents. When arrested the appellant did not tell PW5 that he was enroute to

the wedding ceremony in Kulai or that he was delivering *kain batik* to Najib and Taib. He also did not tell SP5 that the gunnysacks contained *kain batik*. He denied he attempted to escape or that a struggle took place between him and the police. Even at the time his statement was recorded the accused never informed the recording officer about the *kain batik*.

[12] Since a maximum evaluation of the evidence at the end of the defence case entails re-evaluation of all the evidence adduced in the course of the hearing, inclusive of that adduced by the prosecution, we now discuss the essential ingredients of the charge and other salient issues. It was the evidence of the appellant that he only knew of the actual contents of the gunnysacks, after the police had opened them at the time of his arrest, and told him of them. It was also his evidence that the reference to ganja (cannabis) in P20 was the *kain batik*.

[13] As regards the usage of the word ganja the learned judge had occasion to write the following in his grounds of judgment:

> Mengenai P20 tersebut, tertuduh dalam keterangannya telah menjelaskan bahawa ganja yang beliau maksudkan semasa memberikan P20 ialah kain batik. Menurut tertuduh semasa Lazim meminta beliau membawa kedua-dua guni plastik ke Segamat beliau tidak tahu isi kandungannya adalah ganja. Menurutnya pertama kali beliau tahu kandungan kedua-dua guni plastik tersebut adalah ganja adalah apabila polis membuka kedua-dua guni plastik tersebut. Jadi, menurut tertuduh, apabila beliau memberikan P20, beliau telah tahu isi kandungan kedua-dua plastik tersebut adalah ganja. Dengan itu beliau merujuknya sebagai ganja di dalam P20 tersebut apabila ditanya mengenainya.

[14] If the learned judge had believed the appellant or even had some doubt of his knowledge, by the flow of events and sequence, which culminated in P20, it would be reasonable for him by then to refer to the contents as ganja rather than *kain batik*. Putting it another way, to continue referring to the contents as *kain batik* would be rather unusual if by then he already knew it was cannabis. Unfortunately for the appellant, the learned judge disbelieved him, as, the learned judge opined that it was improbable that he did not know the contents of the gunnysacks were cannabis. His eventual decision in no small way was influenced by P20's contents, which hinged on the play of words.

[15] Undeniably, to be fair to the learned judge, he had some basis when he disbelieved the appellant. He viewed that if it were true that the appellant believed that the gunnysacks contained *kain batik*, he should have told the police of the contents when arrested, or at least inform the investigating officer at the earliest opportunity. The appellant too had not raised the issue of *kain batik* during the prosecution's stage and hence concluded that the defence was

an afterthought. His act of running away, when PW5 introduced himself was of no help to the appellant especially if he had believed that he was carrying *kain batik*.

[16] We now touch on the reasons why we eventually amended the charge. It is a fact that P20 ie the cautioned statement was tendered by the prosecution. That being so, the prosecution must stand by every material strand of the contents, and cannot be discriminating unless any of the information is inherently improbable. If any of the contents were material, and unwittingly had weakened the prosecution's evidence or helped the appellant's case in some way, then the prosecution must inevitably acquiesce to the repercussion of its course of action, if any. Naturally, the appellant will be entitled to reap the benefits flowing from the chinks in P20. From the flow of the contents or its very contents, if it has led to some reasonable doubt creeping into the mind of the learned judge that he knew the contents of the gunnysacks, he then is entitled to the acquittal (*Mat v Public Prosecutor* [1963] MLJ 263). Even if the court rejects his explanation, the court must still test that explanation with the prosecution's case and determine whether a reasonable doubt has been raised. It is never the legal proposition that the court has to believe the appellant before acquitting him.

[17] We had to bear in mind that P20, like a double-edged saw, had cut across the prosecution's and the appellant's case. The appellant had made mention of Lazim, Najib and Taib but yet at the close of the prosecution's case, as reflected at p 139 of the rekod rayuan, those named persons were never investigated, called or offered. These people were certainly not fictitious persons as their names cropped up during the prosecution's case. This failure to do any of the mentioned acts by the prosecution, at the very least over Lazim, was a serious omission, which warranted the invocation of this adverse inference provision. With so much at stake, any lingering doubt of whether the appellant actually knew the contents of the gunnysacks could have been dispelled, had the named persons in the cautioned statement been investigated. Even though s 114(g) of the Evidence Act 1950 is a permissible inference and even though there is no obligation on the prosecution to examine all witnesses mentioned by the appellant, this panel could certainly invoke this adverse inference if the prosecution were influenced by some oblique motive. *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 when laying down the test of invoking adverse inference under s 114(g) of the Evidence Act remarked:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limits. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[18] Scrutinising the notes of proceedings, the flaw of the prosecution's case was compounded further by the want of explanation of the nonchalance. In the circumstances of the case, an inference drawn in the appellant's favour is warranted (*Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631; *Public Prosecutor v Lim Ah Bek* [1989] 2 CLJ 1090).

[19] Of Lazim, in the first judgment, even the learned judge had occasion to state:

> P20 menunjukkan bahawa dadah tersebut adalah kepunyaan Lazim untuk diserahkan kepada Najib atau Taib di Segamat. Walau bagaimanapun tidak ada keterangan yang dikemukakan oleh pihak pendakwaan melalui pegawai penyiasat kes ini mengenai tindakan yang diambil berikutan dengan pengakuan yang dibuat oleh tertuduh tersebut. Tanpa penyiasatan dibuat, ada kemungkinan Lazim, Najib atau Taib tersebut yang menjadi pengedar sebenar dalam kes ini. Tertuduh hanya memilikinya sementara menunggu diambil oleh Najib atau Taib.

[20] Even though it could be argued that the first judgment would be inapplicable, the fact that the first panel never supplied any ground of judgment to explain its decision, gives us the window of opportunity to gauge the above opinion. In light of the appellant's evidence at the stage of the defence, what more a court must carry out a maximum re-evaluation of the evidence at the close of the defence case, it legitimised us to peruse the first judgment. The above opinion of the learned judge was not without merit. The adverse inference to be attached, amongst others, to the non-calling of Lazim is that had he been called it would have cast some doubt whether the appellant had any knowledge of the drugs. Without knowledge there can be no possession. As Gordon Smith Acting CJ in *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54 said:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, (and must have in him a power of disposal over the thing), and lastly must be conscious of his possession of the thing.

(*Public Prosecutor v Kau Joo Huat* [1988] 2 MLJ 91 has made the legal requirement of power of disposal obsolete).

[21] Apart from the failure to investigate, call, offer or supply some explanation regarding Lazim, Najib or Taib, the prosecution at its stage likewise never attempted to clarify the ownership of that car (WBK 6708), in which the appellant was arrested. The testimony of the appellant was never challenged when he testified that Sulaiman ie the brother of Lazim owned the vehicle. Without any cross-examination on this issue of ownership, the court thus must accept the testimony of the appellant (*Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212). In his evidence, the appellant too testified that Lazim had

handed over another person's car to him, and drive solo from Terengganu to Johore. As regards the ownership of this car, the learned judge had authored:

> Tambahan lagi tidak diketahui siapakah pemilik kereta WBK 6708 yang dipandu oleh tertuduh. Tidak ada keterangan yang dikemukakan oleh pihak pendakwa mengenai perkara ini. Ini menimbulkan tanda tanya yang tidak dijawab oleh pihak pendakwa.

[22] For the prosecution to succeed in obtaining a conviction it must establish not only that the appellant had knowledge of the existence of the drugs but that he had exclusive custody and control of them (*Chan Pean Leon v Public Prosecutor* [1956] MLJ 237; *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632). With the prosecution failing to establish that the appellant was the owner of the vehicle, and with the testimony of the appellant standing unchallenged, the ownership must fall on Sulaiman. That being so with Lazim as the last person to have custody of the vehicle, before being commandeered by the appellant, and Sulaiman as the actual owner, it was not inherently improbable that they separately, or perhaps in concert had left the drugs in the boot of the car. The appellant's role would be the innocent and momentary courier and this defence, which was enunciated in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 and *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222, is not without merit. Lazim is a real person and not a mere figment of the appellant's imagination invented for the purpose of the trial. He was introduced by the prosecution vide P20. Without any duty imposed on the appellant to absolve himself of the ownership of the drugs at the prosecution's stage let alone there was no exclusivity of possession of the drugs, strengthened by a credible defence of innocent carrier, the position of the prosecution thus was untenable.

[23] We now touch on the approaches applied in the first and second judgments of the learned judge. It was obvious that there were distinct and fundamental shifts in the approach of the learned judge in them hence the need for this discussion. It was clear that the learned judge had invoked the presumption of knowledge under s 37(d) of the Act and the presumption of trafficking under s 37(da) of the Act in the first judgment before deciding that the appellant had rebutted the presumption of trafficking. The learned judge ventilated in the latter judgment as follows:

> Atas fakta tersebut anggapan statutory di bawah s 39(d) ADB telah timbul terhadap tertuduh iaitu tertuduh adalah sehingga dibuktikan sebaliknya dianggap memiliki cannabis tersebut dan adalah dibuktikan sebaliknya juga dianggap mengetahui sifat dadah tersebut.
>
> Dadah yang dimiliki oleh tertuduh ialah seberat 29,345.5g. Menurut s 37(da)(vi) seseorang yang memiliki 200g atau lebih dadah cannabis adalah dianggap sebagai mengedar dadah tersebut sehingga dibuktikan sebaliknya. Memandangkan dadah

yang dimiliki oleh tertuduh adalah melebihi 200g maka anggapan di bawah s 37(da)(vi) telah juga timbul terhadap tertuduh.

[24] As the learned judge had found that the ingredient of trafficking had been rebutted the charge was reduced to s 6 of the Act read together with s 39A of the same Act. The basis for the rebuttal of trafficking was premised on the drugs having been owned by Lazim, the person who had directed the appellant to hand over the drugs to Najib and Taib.

[25] It must be highlighted that the first judgment was prepared on 11 March 1998 whilst *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 was decided on 7 December 1997. Without any grounds of judgment supplied by the first panel to clarify matters, let alone nothing had been recorded in the notes of proceedings to indicate *Muhammed bin Hassan v Public Prosecutor* had been discussed at anytime, we were thus not in a position to comment about it. We therefore are unable to give any reason why the legal effect of the latter case, which rejected the invocation of double presumption was accorded insufficient consideration by the first panel.

[26] Notwithstanding that, a maximum evaluation exercise must be undertaken at the close of the defence, whereupon the learned judge must consider all the evidence adduced as provided for under s 182A(i) of the Criminal Procedure Code (*Balachandran v Public Prosecutor* [2005] 1 CLJ 85). As the appellant had not remained silent, not only was there a need to test the veracity of his evidence against the prosecution's evidence, but also all the possible legal considerations alluded to by the learned judge and the first panel. Unfortunately, the reconsideration of the invocation of the double presumptions never took place, as the learned judge abandoned them and thus avoided the earlier obvious errors.

[27] We begin the discussion with the earlier invocation of the presumption provision by the learned judge, as reflected in the first judgment. Come the end of the trial in the reinstated trafficking charge, when intending to establish the ingredient of possession, the learned judge had changed his stance. Instead of adverting to the same provision of s 37(d) of the Act he instead shifted to direct evidence to establish possession. The abandonment of the allusion to that statutory provision is obvious, as reflected in the second judgment, when the learned judge made no further mention of his previous stance on this matter. Instead, and without supplying any reason, he simply stated that possession here was affirmative rather than presumptive. He said:

Dari keterangan yang terdapat di dalam kes ini, saya dapati tertuduh ada pengetahuan bahawa kandungan di dalam kedua-dua guni plastik adalah ganja.

[28] That radical change of stance from s 37(d) to affirmative possession bothered us considerably, as no change in the status of the prosecution's case had ever taken place. The first panel had meted down no order of retrial that could have permitted the calling of new witnesses or even recalling former witnesses; or for that matter any direction having been given, stating that affirmative possession had successfully been established. In a nutshell there was no new material before the learned judge which could have justified this change of stance.

[29] The only saving factor that could have justified the learned judge in alluding to the finding of affirmative possession, like that of the first panel, must be the contribution of the prosecution's submission at the abovementioned p 143 of the rekod rayuan. On the other hand, we could not avoid asking ourselves how that finding could be supported, in light of the adverse inference drawn, no exclusivity of possession having been established, and the existence of a credible defence of being an innocent carrier.

[30] The second connected matter, which caught our attention, was the radical shift of position by the learned judge when attending to the ingredient of trafficking. At the risk of repeating, despite the want of any specific factual directions by the first panel, the learned judge when resolving this ingredient, had abandoned his original allusion to s 37(da) of the Act and instead invoked s 2 of the Act. He said thus:

> Perbuatan tertuduh itu tergulung kepada perbuatan mengedar dadah seperti yang didefinisikan di bawah s 2 Akta Dadah Berbahaya 1952.

[31] Again no explanation was offered for this shift of position. By invoking s 2 of the Act, aside from departing from his original stance, the learned judge had substituted the prosecution's case, which had clearly alluded to s 37(da) of the Act (see again p 143 of the rekod rayuan) in order to establish the ingredient of trafficking. In *Lim Hock Boon v Public Prosecutor* [2007] 1 MLJ 46; [2007] 4 CLJ 114 the court had occasion to criticise the prosecution for switching the premise of its prosecution at the end of the case much to the disadvantage of the accused person. The court said:

> Throughout its case, the prosecution proceeded on the basis that it was relying on s 37(da). The accused also presented his case along the lines that the prosecution was relying purely on s 37(da) of the Act. That much is clear from the appeal record. To resort to the wide and untrammeled definition in s 2 of the Act at the end of the case, being quite ineffective as a matter of law, would be unfair and unjust to the accused.

[32] A fundamental error, as in the above case, had occurred in this appeal, as the appellant had tailored his defence based on a rebuttal of a presumptive provision as indicated by the prosecution at the end of its case, as opposed to an

allegation of trafficking founded on direct evidence. At no time did the prosecution suggest the latter approach as its alternative argument. By the appellant being caught flat-footed due to the unexplained shifting of position by the learned judge, an injustice had taken place.

[33] To reiterate, in the circumstances of the case it was rather unsafe for this panel to uphold the conviction of trafficking, in light of the nonchalance of the prosecution that attracted the adverse inference, the failure to establish exclusive possession, and the subsequent unexplained radical shifting of stance, be they for the establishment of the ingredients of possession or trafficking. The shifting of stance for the establishment of the ingredient of trafficking clearly militated against the prosecution's case, which also effectively derailed the defence of the appellant. Due to the seriousness of the error there was thus ample ground for appellate interference (*Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337; [1998] 2 CLJ 469). We thereupon allowed the appeal and set aside the conviction order. In substitution, we found the appellant guilty of an offence under s 6 of the Act read together with s 39A(2) of the same Act and accordingly convicted him. We imposed a sentence of 20 years imprisonment, with effect from the date of arrest, and ten strokes of the rotan.

Appeal allowed.

Reported by Andrew Christopher Simon